

## FOREWORD: THE CHALLENGES OF CHANGE

MICHAEL BYERS\*

There is a growing awareness within the United States of the world outside its borders. For better or worse, the international has become domestic and the domestic international. Coupled with this growing awareness is an ever-greater certainty that knowledge of other cultures, societies, and political and legal systems forms an essential part of the education of America's future leaders. In politics, business, law, and science the challenges—and the opportunities—are increasingly, inevitably global.

The editors of the Duke Journal of Comparative and International Law are well prepared for the challenges of an internationalized world. Curious, broadminded, intellectually rigorous, and socially conscious, these students have deliberately embraced the study of other cultures, societies, and systems. Some will have done so because they are themselves international, having come to the U.S. from elsewhere, or having spent considerable time abroad. Some will have done so out of a desire to better understand the political and legal system, and culture of the U.S. through the invaluable exercise of comparison. All of them will have done so with the knowledge that, for the leaders of their generation, a developed understanding of the international is no longer optional.

Consistent with their interests and standards, the editors have selected a highly topical, wide-ranging collection of superb articles, essays, and notes. The lead article, by Professor Joyce Palomar of the University of Oklahoma, deals with the pressing topic of how to improve land tenure security in China. With China's accession to the World Trade Organization on December 11, 2001, the challenge of integrating the world's largest market into the global economy is near the very top of the international agenda. It is a challenge of supreme importance for the Chinese government, which clearly realizes that substantial domestic reforms are needed if foreign investment and capital markets are to develop in ways that will offset the social and

---

Copyright © by Michael Byers

\* Associate Professor, Duke University School of Law; Peter North Visiting Fellow, Center for Socio-Legal Studies and Keble College, Oxford University.

economic dislocation caused by opening China up to the rest of the world. As Professor Palomar convincingly argues, land titles secured by law would enable people to transfer their property, develop it for more valuable purposes, use it as collateral for credit both domestically and internationally—and in these various ways dramatically increase the value of land as a factor of production.

Professor Palomar's article provides an illuminating review of the current unwieldy, fragmented, and inefficient Chinese land title system and the risks it poses to investors. For this reason alone her article should be required reading for Chinese officials and potential investors alike. But the most significant contribution comes in the form of proposals as to how the system could be improved, including by reorganizing and consolidating the registration system and introducing private risk reduction services and land use rights insurance designed specifically for China. This is an invaluable article, published at precisely the right time.

Professor Helene Shapo of Northwestern University has contributed a fascinating comparative law analysis of the globally important issue of frozen embryos. Her specific concern is with the fate of embryos produced through in vitro fertilization by a husband and wife, and then frozen and stored, where the couple later divorces and one party seeks custody over the embryos for further implantation. How should pre-conception contracts be weighed against the parties' interests in becoming—or not becoming—parents, particularly given their likely emotional state at the time they enter such contacts? Professor Shapo's analysis takes her from the U.S. to Israel to the United Kingdom, contrasting the somewhat different approaches taken in these three countries. She concludes that the U.S. law on this issue is in disarray, and that the Israeli approach, which focuses on expectations and justice, is at least defensible. She also predicts that British law, following the recent incorporation of the European Convention of Human Rights, will soon adopt an approach that seeks to balance each party's interests in light of the particular circumstances of their case. Such an approach, Professor Shapo suggests, is the preferred one in this context, where the usual premises of objective contracting do not pertain. This thought-provoking article will be of interest to a wide range of readers, and is an excellent example of the major contribution that comparative legal analysis can make to the understanding and ongoing development of U.S. law.

Another major challenge is the development and implementation of effective yet impartial judicial mechanisms for securing redress

for the victims of state-sponsored terrorism. Professor William Hoyer of Notre Dame University provides a timely and thought-provoking analysis of one possible approach, namely the lifting of sovereign immunity and the use of civil actions in U.S. courts. After a careful examination of the case law under the 1996 U.S. Antiterrorism and Effective Death Penalty Act, which lifted the immunity of those countries identified by the State Department as “state sponsors of terrorism,” he concludes that this approach is neither effective nor appropriate.

Professor Hoyer’s conclusion may be unpopular in the current political climate, but it is based on reasoned arguments. The use of civil actions in cases of this kind encounters difficulties when it comes to the execution of the resulting judgments against assets. There is also a serious risk of interference with the conduct of foreign policy. In addition, this approach favors those victims of terrorism who are U.S. citizens, over those who are not. In light of these shortcomings, Professor Hoyer argues that the International Criminal Court should instead be empowered to hear cases concerning terrorism, punish the individuals and states responsible, and compensate the victims. He suggests that the atrocities of September 11th have provided a unique opportunity for advancing and implementing this alternative approach. This is a courageous article designed to provoke a rethinking of policies on the use of national courts in terrorism cases and the desirability of an International Criminal Court—a court with even more extensive jurisdiction than that currently opposed by the U.S. government.

Marc Weisberger, a London-based practitioner, has made an equally valuable contribution to our understanding of the relationships between different legal systems, in this instance the rules and decisions of the World Trade Organization on the one hand, and the legal system of the European Communities on the other. Three recent decisions of the European Court of First Instance, and a fourth decision by the European Court of Justice, have held that WTO member states have only a “soft” obligation to implement decisions rendered by the WTO dispute settlement mechanisms. Mr. Weisberger cogently argues that the courts took the correct approach, since WTO member states have the treaty right to pay compensation for a violation rather than coming into compliance. He then goes on to explain how the courts in each of these cases decided that the option of non-compliance means that WTO rules and decisions cannot be given direct effect in the EC legal order.

Mr. Weisberger's article is extremely relevant, in Europe and elsewhere. For those interested in U.S. constitutional law, the article provides insight into an important parallel to the distinction between self-executing and non-self-executing treaties. For those interested in the relationship between international politics and international law, it casts considerable light on how political and legal spheres are sometimes carefully delimited by negotiators, and how the delimitation is then maintained by the courts. And for those who follow the political and legal integration of Europe—as indeed we all should, given its enormous impact on international affairs—the article helps us understand how the world's most significant regional order is coming to grips with the increasingly important global order of the WTO.

Dr. Edward Kwakwa's remarkable essay on rulemaking at the World Intellectual Property Organization draws on his own considerable experience as "in house counsel" to a number of international organizations. It dispels a series of prevailing myths: that international organizations are financially dependent on domestic taxpayers, that states are the exclusive creators of rules and institutions at the international level, that international law is based solely on state consent, and that treaties thus dominate international law-making. Who would think that the World Intellectual Property Organization, which is part of the United Nations system, derives more than 85 percent of its \$410 million annual income from fees paid by private sector users of the registration services it provides? Or that bodies such as the International Labor Organization, International Civil Aviation Organization, and World Health Organization regularly supplement treaty obligations without seeking the specific agreement of member states? Or that by far the most influential actor in international efforts to regulate the Internet is a nonprofit public interest corporation organized under the California Nonprofit Public Benefit Corporation Law? Clearly, the international legal system is changing by the moment, and much of what we teach and learn in law schools needs to change as well. Dr. Kwakwa has given us a strong push in this direction.

One of the most impressive attributes of the editors is their ability to produce cutting-edge research themselves. This issue of the DJCIL contains two student notes. The first, written by Joseph Eckhardt, addresses a health issue of global importance, namely the international effort to reduce tobacco consumption. As Mr. Eckhardt explains, nearly 100,000 young people take up smoking each day and, by 2020, more people will die from tobacco-caused diseases than from any other single disease. In response to this looming public health ca-

tastrophe, the World Health Organization is developing the Framework Convention for Tobacco Control, the first instrument in an incrementally constructed normative system designed to reduce tobacco consumption worldwide. Of the many legal, political, and epidemiological issues involved in this initiative, the most pressing is probably the relationship between the framework convention and international trade law. With the World Trade Organization's dispute settlement system widely seen as prioritizing free trade over health and environmental concerns, designing the framework convention in such a way as to make it WTO-compatible is a matter of the highest priority.

Mr. Eckhardt makes a major contribution to this effort. After a careful analysis, he concludes that the current draft of the framework convention does not conflict with international trade law. As important, he also indicates how the protocols that will eventually provide the legal content for the framework convention could be designed to be WTO-compatible, while remaining effective. This note is essential reading, not only for those directly involved in the World Health Organization's work on tobacco, but for anyone involved or interested in modern methods of developing international law, with regard to any issue.

The second note, written by Francine Hochberg, provides a comparative analysis of blood donation policies in six different countries. Ms. Hochberg's analysis is directed specifically at how different political and legal systems balance the sometimes-competing goals of public health and individual human rights, and in particular the right not to be discriminated against when wishing to donate blood. She determines that donation policies that exclude groups such as homosexual men are perceived by policy makers as community health rather than individual rights issues, and concludes that the prioritization of public health that inevitably results is justified—provided that the ends sought are achieved. The strength of Ms. Hochberg's note comes from her firm grasp, not only of comparative legal method, but also of the medical issues involved in blood donation and HIV/AIDS. What looks at first glance like the triumph of utilitarian reasoning over individual human rights becomes compelling once we learn of the very high degree of transmission risk involved in blood transfusions, and how extraordinarily difficult it would be to exclude infected blood without excluding those groups of potential donors statistically determined to constitute a risk.

We live in dangerous and challenging times, but so too has every generation. And every generation has demonstrated the ability to

rise to the challenges it has faced, by finding innovative solutions through new technologies, institutions, and means of cooperation. With the challenges of today being increasing international in character, the editors of the DJCIL are well positioned to help solve the most pressing of problems. Indeed, they have already done so, by writing, selecting, editing, and publishing seven excellent articles, essays, and notes on some of the most intractable and urgent international issues: state-sponsored terrorism, global epidemics, rapidly developing medical technology, international trade, and law-making in the fast moving world of the Internet. Having read their work with interest and appreciation, I await their future accomplishments with even greater hope and expectation.